UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

COMMUNITY MEDICAL CENTER, INC.

and

Cases 4-CA-34888 4-CA-35025 4-RC-21199

NEW YORK STATE NURSES ASSOCIATION

Randy M. Girer, Esq., for the General Counsel. Hope A. Pordy, Esq., for the Charging Party-Petitioner. Maurice J. Nelligan, Jr., Esq., for the Respondent-Employer.

SUPPLEMENTAL DECISION

Statement of the Case

BRUCE D. ROSENSTEIN, Administrative Law Judge. On December 9, 2008, the Board issued an Order remanding the proceeding to the undersigned for further consideration.¹ The Board directed me to address the Respondent's primary defense in one of the Section 8(a)(1) allegations alleged in the complaint that Vice President of Patient Care Services, Lauren Burke did not introduce the concept of shared governance at a meeting held on October 18, 2006,² because the concept was an established model that substantially predated the Union campaign. The Respondent argues that shared governance was first implemented in 2001 when Burke's predecessor adopted the "Councilor" model of shared governance in anticipation of the Respondent's application in 2002 to the American Nurses Credentialing Center (ANCC) requesting Magnet Recognition.³ The Respondent further asserts that the record shows that, in

¹ I issued my original decision in this matter on March 14, 2008, finding a number of violations of Section 8(a)(1) of the Act along with a recommendation to set aside the January 11, 2007, election based on meritorious objections filed by the Petitioner.

² All dates are in 2006 unless otherwise indicated.

³ According to the Respondent, the Magnet Recognition program developed in the 1980s when research established that hospitals involving nurses in clinical issues attracted more dedicated nurses. The Respondent received the Magnet Award in March 2003 for a four-year period. The Respondent asserts that shared governance is a necessary component in Magnet designation, noting that the 2003 Magnet Award included the recommendation that the Respondent "continue implementation of the shared governance structure."

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the summer of 2006, Burke began advocating for the Councilor model of shared governance as part of the Respondent's application for re-designation as a Magnet hospital. The Respondent opines that Burke chose to use the term "shared governance" at the October 18 meeting simply because the term had been used previously by the ANCC in its recommendation accompanying the 2003 Magnet Award.

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The Position of the Parties

The General Counsel alleges in paragraph 8 of the complaint that on or about October 18, Respondent by Burke, at a meeting with employees at the Medical Center, by introducing and describing a shared governance concept, promises its employees improved terms and conditions of employment in order to discourage them from selecting the Union as their collective-bargaining representative.

The Respondent argues that Burke did not introduce the concept of shared governance at the meeting since the concept was an established model that predated the Union campaign. In asserting that Section 8(a)(1) of the Act has not been violated, the Respondent contends that shared governance is a necessary component in Magnet designation, noting that the 2003 Magnet Award included the recommendation that the Respondent "continue implementation of the shared governance structure."

Background and Facts

In 2002, Respondent introduced the "Councilor" model which consisted of four councils: nursing practice, nursing performance improvement, nursing research and nursing leadership (R Exh. 12). The Councils were established by Burke's predecessor prior to Respondent's application for the Magnet award in 2002. In March 2003, Respondent was awarded magnet status for a four-year period. The award is given by the ANCC, an affiliate of the American Nursing Association.

The Professional Practice Council (PPC) had nursing representatives from the various units and met monthly. The nurses primarily discussed nursing policies; however there were discussions of some working conditions.

Teresa Wiencke was appointed to the PPC in 2002, and participated until October 2006, when she resigned after shared governance was announced.

Sandy Mathis served on the PPC starting in 2004 and attended three or four meetings each year. After shared governance was announced in October 2006, Mathis attended two PPC meetings but testified that no discussion took place regarding shared governance.

Wiencke and Catherine Heuschkel served on the committee to assist Respondent in applying for the Magnet award in 2002, and they both testified that no one informed them that shared governance was a prerequisite for receipt of the award.

Burke testified that on September 8, Vice President of Nursing for the Saint Barnabas Health Care System Nancy Holecek mandated that a system-wide Professional Nursing Practice Council (PNPC) be established (R Exh. 14), however, the document does not mention shared governance. Once the system-wide PNPC was established, the PPC merged with it and a memorandum dated September 25 was sent to the nurses announcing the merger. That document, (R Exh. 15), does not mention shared governance. Burke further testified that she implemented shared governance based on the March 12, 2003, recommendations form the

Magnet committee (R Exh. 13), that the Respondent "Continue implementation of the shared governance structure." Burke admitted, however, that prior to October 18, she never distributed any materials, held plenary nurse meetings or made power point presentations regarding shared governance.

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Helen Hucker, Linda Gural and Mathis all testified that the first time that shared governance was implemented by Respondent was during the organizing drive in October 2006. Further, they were certain that no announcement was made about the shared governance concept during the 2002-2003 Magnet Award application process and the Respondent received the Award in March 2003 without implementation of shared governance.

At the direction of Holecek, the concept of shared governance was ceased in April 2007. Minutes from the PPC meeting held on April 9, 2007, show that the term shared governance was no longer in use at the Respondent (GC Exh. 67). Burke testified that after the term shared governance was abandoned, Respondent continued the process of applying for the 2007 Magnet award without relying on the concept of shared governance.

In June or July 2006, according to Ruiz, Merlin, Wiencke, and Regina Smith⁴, Keith Peraino informed employee Union organizers at a meeting held at the Quality Inn Hotel that the only way the Hospital could counter Union activity was by the introduction of shared governance. It was a way of organizing without having a union because the nurses would have a greater say in their working conditions.

Shared governance is a concept wherein registered nurses are able to work alongside management to develop better working conditions and practices to ultimately improve patient care. In its simplest form, it is shared decision-making based on the principles of partnership, equity, accountability, and ownership at the point of service. This management process model empowers all members of the healthcare workforce to have a voice in decision-making (GC Exh. 31, 53, 54 and 84). In addition, according to Burke, the concept would enable nurses to do some self scheduling and help staff the department the way they felt was best.

Commencing in July 2006, Burke and Rosen started meeting with individual employee Union organizing committee members to propose the concept of shared governance and to encourage them to act as liaisons from their respective Units.

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As discussed in my original Decision, Peraino telephoned Hucker and Gural in August 2006, to inform them that he along with Rosen would be working on shared governance and that Holecek wanted it to work and be implemented.

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In July 2006, Rosen came to the intensive care Unit with the Director of the Critical Care Unit Judy Boccellato who introduced Gural to Rosen. Thereafter, Rosen met with Gural in the conference room during duty time and after informing her that she was very influential with the nurses at the Hospital due to her expected elevation to the Presidency of the New Jersey State Nurses Association⁵, advocated the concept of shared governance stating that it would be a better way to go than unionizing.

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⁴ Smith is a registered nurse in the Emergency Department. She has been employed for approximately ten years and served on the Union's organizing committee in both election campaigns.

⁵ On August 1, Gural was elected President of the New Jersey State Nurses Association.

In September 2006, Wiencke was called into a meeting with Rosen and Burke and was solicited to become a member of the shared governance committee. Wiencke said that she was not interested since it was a conflict of interest with her Union organizing responsibilities.

In September 2006, Rosen and Burke met privately with Hucker. This meeting occurred after she encountered Peraino in the lobby of the Hospital and he told her that the shared governance concept would be a good instrument for nurses. He further informed Hucker that Holecek wanted it to work and the Union was not all it was cracked up to be.

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Rosen informed Hucker during the hour long meeting held on duty time that shared governance would be between the employees and the administration and that it would give nurses a voice in practice issues and permit them to raise their concerns. Rosen and Burke asked Hucker to co-chair the shared governance committee and act as its corporate liaison. Rosen told her that Holecek really wanted it to take off and if the Union came in it could cost Burke her job.⁶ Hucker replied that she could not give them an immediate answer as she had a number of personal issues on her plate particularly the deployment of her son to Iraq.

In late September or early October 2006, Burke met with Hucker to discern whether she would accept the position. Hucker told Burke that she had to decline the offer.

Rosen also met with Union Organizing Committee member Smith on three or four occasions to talk about shared governance, stating that it would be beneficial for the nurses and they would have a voice in patient care and practices at the Hospital. Rosen also stated in these conversations that the Union was a bad alternative and it would not do anything for you. Rosen also offered Smith a position on the shared governance committee, which she turned down.

On October 18, the Employer held a registered nurse (RN) lunch and learn meeting to officially communicate the concept of shared governance to employees.

During the meeting, Burke gave a power point presentation on shared governance and at the conclusion of the meeting told nurses that they should ask their co-workers to volunteer for the committee, but if they did not volunteer, then the Unit directors would request employees to serve on the shared governance committee.

Commencing on or about October 18, the shared governance concept was implemented at the Hospital during the critical period.⁷

⁶ Burke denied that such a statement was ever made in her presence. However, the weight of the evidence is to the contrary. In this regard, employees Wiencke, Hucker and Seal all testified that they were told by Rosen and other managers that Burke would lose her job if the Union came into the facility. Additionally, Rosen did not deny that she made the statement about Burke losing her job if the Union came into the facility.

⁷ Both Burke and Rosen testified that shared governance involved scheduling and staffing, thus impacting terms and conditions of employment. Moreover, the shared governance book distributed by Burke at the October 18 meeting states specifically that nurses will have the authority to make decisions and will participate in deciding issues related to terms and conditions of employment such as staffing, scheduling, hiring and performance evaluations (GC Exh. 31).

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Discussion

Peraino, while still working for the Union, shared his opinion that the shared governance concept could be an impediment to organizing the nurses and might be a critical element in the Employer's campaign to oppose the Union.

During the period while Peraino was still employed with the Union, the record shows that he made a number of telephone calls to Rosen either at her home, cell, or work number (GC Exh. 32 and 34). While the Employer argues that the telephone calls could have related to the Legal Nurse Consulting business that they started along with Ruiz, I am guite skeptical of this assertion. In this regard, Peraino testified that since the business was started in 2005, it was never active, never made any money, and was ultimately disbanded in December 2006. Thus, it is reasonable to conclude that the subject matter of these telephone calls concerned issues surrounding Peraino's potential employment with the Respondent, including Rosen's recommendation to Seligman in June 2006 that he be hired, and discussions about the shared governance program/Union campaign. The evidence establishes that once employed with the Respondent, Peraino contacted a number of bargaining unit committee members to apprise them that his employment status had changed and he was now working for the Saint Barnabas Health Care System with the primary goal of working on special projects including the shared governance concept. He routinely met with employees and specifically informed organizing committee members that the Employer was highly motivated to implement the concept and it was the way to proceed rather then having a Union at the Hospital.

Likewise, Rosen was a pivotal and visible figure in pushing the concept of shared governance and often talked to employees with Burke about the program. She apprised those who she spoke with that the shared governance concept was being touted at the highest levels of the Employer and was the best way to proceed rather then having a Union at the facility.

It is apparent to me that Peraino's opinion that the shared governance concept was a tool that could be used to undermine the Union was one of the centerpieces of the Employer's campaign to disabuse employees from selecting the Union as their collective-bargaining representative. While higher level officials of the Employer including Burke and Holecek embraced the shared governance concept, it was the actions of Peraino and Rosen that sought to undermine the Union's message by inducing employees to buy into shared governance rather then supporting the Union. As part of this campaign, and commencing in July 2006, Rosen and Burke targeted members of the Union's organizing committee in an attempt to flip them from supporting the Union. In this regard, Rosen selected the leadership and those nurses that were highly respected by there peers in an effort to soften support for the Union from within, hoping to persuade the Union organizers to cross-over and bring additional nurses into the fold to support shared governance and in effect drop support for the Union.

Since I conclude that Rosen and Peraino were working for and with Burke and Holecek to implement the shared governance program, I find that when Burke held the meeting on October 18, to announce the implementation of the shared governance concept, it was with the express purpose of attempting to persuade and discourage the nurses from selecting the Union as their collective-bargaining representative.

Respondent's argument that shared governance is a continuation of existing practices rather then the introduction of new measures is grounded on the merging of the Professional Practice and Nursing Practice Councils and the requirements that the 2003 Magnet Award

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included the recommendation that the Respondent "continue implementation of the shared governance structure."

I reject these arguments for the following reasons. First, the forming of the system – wide PNPC had no impact on the concept of shared governance. Both documents introduced into evidence to support the formation of the Council do not reference shared governance (R Exh. 14 and 15). Moreover, the merger of the Professional Practice Council and the Nursing Practice Council that was announced on September 12 does not reflect in the minutes of that meeting any mention of shared governance (GC Exh. 19). Likewise, the minutes for the October 18 meeting to announce the implementation of shared governance make no mention of the merger of the two committees (GC Exh. 66).

Second, the Respondent's argument that the Magnet Award requires the continued application of shared governance is also unavailing. In this regard, the evidence establishes that no effort was undertaken to implement shared governance during the application process leading up to the receipt of the Magnet Award in March 2003. This is confirmed by the credible testimony of employees Gural, Wiencke and Heuschkel who were never informed by Respondent that shared governance was a requirement to qualify for the Award. Moreover, both Wiencke and Heuschkel served on the committee to assist in the application process and were never informed by Respondent that shared governance was a condition for receipt of the Award. Indeed, Burke admitted that no information was distributed, no meetings were held, and no committee's were formed to address the model of shared governance between the commencement of the application process in 2002 and October 2006. I also note that shared governance was not relied upon in Respondent's 2006 Magnet award application, as they abandoned the term altogether in April 2007, a mere three month period after the Union lost the January 11, 2007 election. ⁸

Contrary to Burke's testimony that shared governance was required by the Magnet Award, I conclude that the Respondent successfully obtained the Magnet Award in March 2003 relying on the "Councilor" model of nursing committees rather then on the concept of shared governance. Indeed, the evidence establishes that shared governance was not implemented at that time. Now, the Respondent attempts to shield its first-time implementation of the shared governance model in October 2006, by bootstrapping what did not occur in 2003. The reliance on the mention of shared governance in the March 12, 2003 communication from the Magnet committee is misplaced (R Exh. 13).

Under these circumstances, and particularly noting that the implementation of shared governance was a new measure targeted to secure support from known Union supporters and to have them influence others, I find that the Employer engaged in conduct violative of Section 8(a)(1) of the Act. See, *Audubon Regional Medical Center*, 331 NLRB 374, 412 (2000) (employer's announcement during critical period of focus action team composed of nurses and managers that dealt with staff issues violated Section 8(a)(1) of the Act). *Beverly California*

⁸ During the course of the trial the Respondent provided shifting defenses regarding the argument that shared governance was required under the Magnet model. For example, the Respondent initially claimed that there was no relationship between the Magnet award and shared governance and later asserted, as it argues now, that the Magnet award requires to continue implementation of the shared governance structure.

⁹ R Exh. 12 states in pertinent part under "Governance Model at CMC" that Nursing Governance at Community Medical Center is reflected in the council and committee structure. Notably absent is any reference to shared governance.

Corp., 326 NLRB 153, 176-177 (1998) (employer's announcement of the formation of employee council to resolve workplace issues, including solicitation of employee participants, violated Section 8(a)(1)).

Accordingly, I reaffirm the finding set forth in my March 14, 2008, decision in this matter including my proposed Order and Notice language regarding this allegation.¹⁰

Dated, Washington, D.C. December 29, 2008 10 Bruce D. Rosenstein Administrative Law Judge 15 20 25 30 35 40 45

The Respondent, Community Medical Center, Toms River, New Jersey, its officers, agents, successors, and assigns, shall Cease and desist from "Promising employees inproved terms and conditions of employment, including a shared governance concept, in order to discourage employees from selecting the Union as their collective bargaining representative."